Filed 11/23/09 Marriage of Campbell CA

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of TERENCE M. CAMPBELL and ANNA B. CAMPBELL.	B210748 (Los Angeles County Super. Ct. No. ED025210)
NAIYANA CAMPBELL, Appellant, v. ANNA B. CAMPBELL, Respondent.	

APPEAL from an Order of the Superior Court of Los Angeles County. William D. Stewart, Judge. Affirmed.

Ralph T. Evans for Appellant Naiyana Campbell.

Russell & Miller and Daryl J. Miller, Helen Clayton, for Respondent Anna B. Campbell.

Naiyana Campbell appeals the trial court's order denying her request for a Qualified Domestic Relations Order (QDRO) designating her husband Terence Campbell's estate as an alternate payee under his former wife's 401k plan. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Anna and Terence's Dissolution Proceedings.

Terence Campbell and Anna Bella Campbell married in April 1969.[1] They had two children, Sean and Natalie, who are now adults. Anna works as a registered nurse, and during and after her marriage, while working for Tenet Healthcare, contributed to a 401(k) plan (Plan).

Anna and Terence separated on December 31, 1999. Terence filed a petition for dissolution on February 1, 2000, and on October 30, 2000, the court entered a judgment of dissolution. The parties' Marital Settlement Agreement provided that Terence would receive 50 percent of Anna's Tenet Healthcare 401(k) Plan, and the parties would sell their home located in Burbank and split the proceeds.

On December 22, 2003, the court entered a Stipulation and Order re Modification of judgment, modifying the parties' settlement. Under the Stipulation and Order, Terence would receive $80,000: "A sum of $80,000.00 out of 401K Pension Plan thru a QDRO, identified under the Tenet Healthcare Corporation Retirement Savings Plan identified as NA2510a, participant Annabelle Campbell, social security number [], that would comply with final agreement regarding [Terence's] share of the 401k Pension Plan, shall be awarded to [Terence]."

After the dissolution, Anna had loaned Terence $35,000 to help pay for surgery Terence needed. Terence advised her he would pay her back out of the $80,000 he expected to receive from the Plan. He did not do so.

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[1] Because the parties share the same last name, to avoid confusion we refer to them by their first names, intending no disrespect.

In 2002, Terence married Naiyana, and on March 21, 2004, Terence died intestate. Naiyana is the administrator of Terence's intestate estate.

2. Proceedings Relating to Naiyana's Proposed 2007 QDRO.

On May 24, 2007, Naiyana joined Tenet Healthcare in the dissolution proceedings; Tenet Healthcare appeared on June 18, 2007. Naiyana filed a proposed Stipulated QDRO, designating Terence's estate as an alternate payee of Anna's Plan, and providing that the $80,000 payment would not be offset by the $35,000 loan from Anna. After Anna objected to the proposed QDRO, the court set a proposed briefing schedule and scheduled a hearing for December 31, 2007.

Anna argued that a QDRO could only issue in favor of an alternate payee, and neither a deceased former spouse nor his estate could qualify as an "alternate payee" under ERISA.[2] Naiyana argued that Terence was not an alternate payee under Anna's 401k plan because the Stipulation and Order gave him a lump sum payment of $80,000. Therefore, she argued, he was a creditor of Anna; the QDRO was merely the mechanism to satisfy her debt to him. At the February 27, 2008 hearing, the court denied Naiyana's request for entry of the QDRO.

On March 29, 2008, Naiyana filed a motion to set aside the Stipulation and Order and requested that the provisions of the original Judgment be reinstated.[3] She argued that because the house, which had not been sold, was now worth more than the $80,000 share of the 401k, the Stipulation and Order was unfair. The court denied Naiyana's request.

On July 9, 2008, the court entered its statement of decision in which it found that the entire 401k belonged to Anna and no QDRO would issue. The court reasoned that issuing a QDRO required a qualified recipient (beneficiary or alternate payee) entitled to some of the rights in the 401k pursuant to ERISA (29 U.S.C. sections 1056 (d)(3) and (d)(3)(K)), and that under ERISA, the term "former spouse" does not include a "deceased spouse."

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[2] The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq.

[3] Naiyana also sought to set aside a previous version of the Stipulation and Order that had been filed October 24, 2002.

The court relied on *In re Marriage of Shelstead* (1998) 66 Cal.App.4th 893, 904, *Branco v. UFCW* (9th Cir. 2002) 279 F.3d 1154, 1158, and *Ablamis v. Roper* (9th Cir. 1991) 937 F.2d 1450, 1456 (*Ablamis*). The court found the death of the non-participant spouse divests that spouse of the title of spouse or other dependent, rendering such spouse an unqualified participant under ERISA. The court concluded that upon Terence's death, his interest in the 401k reverted to Anna. (*In re Marriage of Rich* (1999) 73 Cal.App.4th 419.)

DISCUSSION

I. TIMELINESS OF APPEAL.

Anna contends that Naiyana's appeal is untimely because she did not file her Notice of Appeal until September 5, 2008, more than 180 days after the court's minute order of February 27, 2008. In particular, Anna contends that because the order was appealable as a post-judgment order and did not direct the preparation of a written order, we calculate the date from February 27, 2008, not the July 9, 2008 date of the entry of the statement of decision and written order. (See Cal. Rules of Court, rule 8.104, subd. (d)(2).)[4]

A. Factual Background.

At the February 27, 2008 hearing, the court ordered Anna's counsel to prepare a statement of decision. The court advised the parties it would set the matter for hearing when it received the proposed statement of decision. On February 27, 2008, the court entered its minute order denying Naiyana's motion. That order states, "[t]he Court directs Respondent to prepare a Proposed Statement of Decision within 20 days. [¶] . . . [¶] Upon receipt of the Proposed Statement of Decision, the Court will set the matter for hearing." On March 28, 2008, Anna filed a proposed Order, and after the hearings of

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[4] California Rules of Court, rule 8.104, subdivision (d) provides in relevant part: "(2) The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed; a written order prepared under rule 3.1312 or similar local rule is not such an order prepared by direction of a minute order. [¶] (3) The entry date of an appealable order that is not entered in the minutes is the date the signed order is filed."

July 9, 2008, the court entered its order denying Naiyana's request for a QDRO and other relief, and adopted the Statement of Decision. On September 5, 2008, Naiyana filed her notice of appeal.[5]

B. The Order of February 27, 2008 Was Not An Appealable Order and Did Not Trigger the Running of the Time Limits to File a Notice of Appeal.

A notice of appeal must be filed within the applicable time period set forth in California Rules of Court, rule 8.104, subdivision (a). There are three possible deadlines: (1) 60 days after the court mails a document entitled "Notice of Entry" of Judgment, (2) 60 days after a party serves on another party a "Notice of Entry" of Judgment, or (3) 180 days after entry of judgment. (Cal. Rules of Court, rule 8.104, subd. (a).) The word "judgment" as used in California Rules of Court, rule 8.104, subdivision (a) includes an appealable order. (Cal. Rules of Court, rule 8.104, subd. (f).)

For purposes of the 180-day time limit, the date of "entry" of an appealable order depends upon whether the order is entered in the superior court's minutes, and if so, whether the minute order requires preparation of a written order. If the order is not entered in the minutes, it is entered for purposes of filing a notice of appeal on the date the order signed by the court is filed. (Cal. Rules of Court, rule 8.104, subd. (d)(3).) If the order is entered in the minutes and the minute order does not require a written order, the order is entered on the date of its entry in the permanent minutes, even if counsel decides to prepare a written order. (Cal. Rules of Court, rule 8.104, subd. (d)(2); *In re Marriage of Adams* (1987) 188 Cal.App.3d 683, 689.) If the order is entered in the minutes and expressly requires a written order, the order is entered on the date the signed order is filed. (Cal. Rules of Court, rule 8.104, subd. (d)(2); *Barak v. Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 658-659).

The timely filing of a notice of appeal is essential to the appellate court's jurisdiction. (*Estate of Hanley* (1943) 23 Cal.2d 120, 129.) A notice of appeal must be filed within the time deadlines specified in California Rules of Court, rules 8.104 and

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[5] Naiyana's Notice of Appeal states that it is from the "Order from the hearing on 2/27/2008 (entered 7/9/2008). . ." and also from the Order of July 9, 2008.

8.108. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) Because a timely appeal affects our jurisdiction, we must dismiss if we conclude appellant's notice of appeal was untimely filed. (Cal. Rules of Court, rule 8.104, subd. (b).)

However, California Rules of Court, rule 8.104, subdivision (d) only sets forth the procedural factors which determine the time to appeal; it does not address the substantive matter of whether the order itself is appealable. (*Lavine v. Jessup* (1957) 48 Cal.2d 611, 613.) If the minute order lacks one of the requisites of a final judgment, including required findings of fact, it is not appealable and the provisions of California Rules of Court, rule 8.104, subd. (d)(2) do not govern our analysis. (*Delaney v. Toomey* (1952) 111 Cal.App.2d 570, 574.)

Here, the February 27, 2008 minute order was not an appealable order because it expressly contemplated the entry of a statement of decision which would contain the court's conclusions and findings. (*Delaney v. Toomey, supra,* 111 Cal.App.2d at pp. 573-574.) Without a statement of decision, the reasons for the trial court's decision otherwise contained in the record could be inadequate to disclose the legal and factual bases for the court's decision. (*In re Marriage of McDole* (1985) 176 Cal.App.3d 214, 219.) In such case, the parties cannot make an informed decision whether to file an appeal because a statement of decision explains the basis for the court's decision as to each controverted issue. (*Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 126-128.) Furthermore, the findings and conclusions in a statement of decision are vital in family law matters because they provide an essential foundation for appellate review (*In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1010) and act as a basis for future proceedings (*In re Marriage of Reilley* (1987) 196 Cal.App.3d 1119, 1126). Therefore, where the minute order calls for the preparation of a statement of decision, it is not an appealable order under California Rules of Court, rule 8.104, subdivision (d)(2). (See *Delaney v. Toomey, supra,* 111

Cal.App.2d at pp. 573-574 [minute order lacking required findings of fact not an appealable order].)[6]

II. NAIYANA CANNOT OBTAIN A QDRO IN TERENCE AND ANNA'S DISSOLUTION PROCEEDINGS.

Naiyana contends she is entitled to the issuance of a QDRO because the Stipulation and Order qualified as a QDRO; even if it did not, it could be corrected nunc pro tunc and issuance is proper after Terence's death. Furthermore, she argues, the interest granted Terence in Anna's 401k was a simple property interest (a fixed amount) and therefore we need not consider whether he was an "alternative payee." We disagree.

ERISA provides a comprehensive statutory scheme governing employee retirement benefits plans. ERISA contains an anti-alienation provision prohibiting the assignment or transfer of benefits (29 U.S.C. § 1056, subd. (d)(1)), but this prohibition was a barrier to the division of assets in dissolution proceedings. Pursuant to amendments to ERISA made in 1984, ERISA's anti-alienation provisions do not apply if the division is pursuant to a Qualified Domestic Relations Order (QDRO). (29 U.S.C. § 1056, subd. (d)(3)(A).) Any domestic relations order that attempts to transfer pension benefits must satisfy the QDRO criteria. (*In re Marriage of Shelstead* (1998) 66 Cal.App.4th 893, 899-900 (*Shelstead*).) A non-participant spouse has no community property rights in the pension plan of the participant spouse unless such rights are transferred with a QDRO. (*In re Marriage of Rich* (1999) 73 Cal.App.4th 419, 423.) This provision therefore permits state family laws to create enforceable interests in the proceeds of an ERISA plan so long as those interests are articulated in accord with its requirements.

A domestic relations order is a property settlement which "relates to the provision of . . . marital property rights to a spouse, former spouse, child, or other dependent or participant" and which is made pursuant to a state's domestic relations law. (29 U.S.C.

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[6] Without citation to any authority, Anna also contends that the appeal should be dismissed as to Tenet Healthcare Retirement Savings Plan because Naiyana did not serve them with her Notice of Appeal or opening brief. We consider the argument waived because it is unsupported by legal authority and analysis. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Commission* (1999) 21 Cal.4th 352, 366.)

§ 1056, subd. (d)(3)(B)(ii)(I), (II).) A domestic relations order is qualified if it "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or portion of the benefits payable with respect to a participant under a plan." (29 U.S.C. § 1056, subd. (d)(3)(B)(ii)(I).) An "alternate payee" means "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." (29 U.S.C. § 1056, subd. (d)(3)(K).) The QDRO must clearly specify the name of the alternate payee and the amount and manner of payments to be made to the alternate payee. (29 U.S.C. § 1056, subds. (d)(3)(D) & (d)(3)(C)(i).) ERISA does not permit a third party to obtain a right to pension benefits unless that person falls within ERISA's statutory definition of beneficiary or "alternate payee." (*Boggs v. Boggs* (1997) 520 U.S. 833, 852 (*Boggs*).) A court may therefore not enter a domestic relations order requiring an ERISA plan administrator to pay benefits to a person who does not fall within the definition of an "alternate payee." (29 U.S.C. § 1056, subd. (d)(3)(K); *Shelstead, supra,* 66 Cal.App.4th at p. 904.)

Furthermore, under its anti-alienation clause, ERISA benefits may not be transferred by the non-participant spouse. (*Boggs, supra,* 520 U.S. at pp. 847-848.) Such transferees qualify neither as "participants" or "beneficiaries" under ERISA. (29 U.S.C., § 1002, subd. (8) ["beneficiary" is a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder"]; § 1002, subd. (7) ["participant" is an "employee or former employer of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit"].) "ERISA's silence with respect to the right of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist." (*Boggs, supra,* at pp. 847-848.) In addition, the term "former spouse" does not include a deceased spouse (*Ablamis, supra,* 937 F.2d at p. 1456), nor does it include the estate of a deceased spouse (*Branco v. UFCW-Northern California Employers Joint Pension Plan* (9th Cir. 2002) 279 F.3d 1154, 1158 (*Branco*)). "Congress' fundamental purpose was evident throughout [ERISA] – to ensure that both spouses would

receive sufficient funds to afford them security during their lifetimes, not to arrange for an opportunity for a predeceasing non-employee spouse to leave a part of [his or her] surviving [spouse's] pension rights to others." (*Ablamis, supra,* 937 F.2d at p. 1457.)

Here, to decide the issues before us, we need not decide whether the Stipulation and Order was a valid QDRO because we conclude Naiyana is not an alternate payee under ERISA as she is neither a spouse nor a former spouse of a plan participant. For this reason, she is also not entitled to the issuance of a new QDRO. (29 U.S.C. § 1056, subd. (d)(3)(K).) Nor can Naiyana inherit Terence's interest under the Stipulation and Order because his interest, as a non-participant spouse, cannot be passed by testate or intestate succession. (*Ablamis, supra,* at p. 1456; *Branco, supra,* 279 F.3d at p. 1158.) Finally, we reject her attempts to characterize the lump sum payment contemplated by the Stipulation and Order as a "simple property interest" not subject to ERISA's anti-alienation provisions. Under the Stipulation and Order, the lump-sum payment was to come from the Plan; therefore, it could only be distributed to her under a QDRO. (See *In re Marriage of Rich, supra,* 73 Cal.App.4th at p. 423.)[7]

[7] Naiyana is correct that a QDRO may be obtained after the death of the participant spouse. (See *Trustees of the Directors Guild of America- Producer Pension Benefits v. Tise* (9th Cir. 2000) 234 F.3d 415, 421.) However, her argument that she can obtain a QDRO notwithstanding Terence's death is moot because Naiyana is not entitled to a distribution from Anna's Plan because she cannot qualify as an alternate payee.

DISPOSITION

The order of the superior court is affirmed. Respondent is to recover her costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.